

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0917

Affirmed
No Disqualification

PROCEDURAL HISTORY: On April 4, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant not for misconduct (decision # 103211). The employer filed a timely request for hearing. On April 29, 2014, ALJ Monroe conducted a hearing, and on May 5, 2014 issued Hearing Decision 14-UI-16847, affirming the Department's decision. On May 23, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted written argument to EAB. The employer failed to certify that it provided a copy of its argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider the argument when reaching this decision.

FINDINGS OF FACT: (1) Lucky Spot, LLC employed claimant from August 1, 2013 to February 20, 2014 as a cashier.

(2) The employer expected employees to report for work as scheduled or notify the employer before the shift began. Claimant understood that expectation.

(3) On approximately February 11, 2014, claimant slipped and fell on the ice, injuring her shoulder and aggravating her kidney condition.

(4) On February 12, 2014, claimant left her shift thirty minutes early, with the manager's permission, due to pain from her kidney and shoulder injuries.

(5) On February 13, 2014, claimant's doctor advised her to refrain from working until her doctor appointment on February 18, 2014. Claimant was scheduled to work on February 16, 2014. Before her scheduled shift, claimant told the manager she was unable to work that day due to her kidney and shoulder injuries.

(6) On February 18, 2014, claimant went to her doctor, who gave her a letter advising her to refrain from working until she received further diagnosis and treatment on February 21, 2014. After her doctor appointment on February 18, claimant told the employer's manager she was unable to work on February 19 and 20 due to illness, and read the doctor's letter to the manager. The manager told claimant she was excused from work on February 19 and 20, but needed to report to work on February 23, 2014. Claimant told the manager she would report to work on February 23, 2014 if the doctor released her to work.

(7) On February 20, 2014, the employer discharged claimant for poor attendance.

CONCLUSIONS AND REASONS: The employer discharged claimant, not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. Absences due to illnesses are not misconduct. OAR 471-030-0038(3)(b). In a discharge case, the employer bears the burden of proving misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the employer argued at hearing that it discharged claimant, in part, because claimant allegedly offered to sell a prescription drug to a customer, the record does not show that the employer knew about that alleged incident until after it discharged claimant. Transcript at 6. The owner's testimony regarding that incident was inconsistent and confusing and did not establish when the employer learned of the incident. *See* Transcript at 16, 20, 21. Nor does the termination notice state that claimant was terminated for attempting to sell prescription drugs to a customer. *See* Exhibit 2 at 3, 6 and 7. The record shows that the proximate cause of the employer's decision to discharge claimant was claimant's failure to attend work on February 16, 19 and 20, 2014, and this is the focus of our misconduct analysis.

Claimant understood the employer expected her to report to work or notify the employer before her shift if she was unable to work due to illness. Claimant told the employer she was unable to work due to illness on February 16, 19 and 20, 2014. The employer's owner testified that he believed claimant missed work for a reason other than illness because a customer told the manager that she saw claimant playing video poker at a nearby tavern, and because claimant did not provide a doctor's note when the manager asked her to do so. Transcript at 11. However, claimant testified that she was ill and her doctor advised her not to work from February 16 to February 21 while she received medical care.

Transcript at 36 to 38. The only evidence at hearing that claimant was in a tavern while missing work was a hearsay statement that a customer allegedly made to the employer's manager, who did not testify at hearing. Transcript at 6. Claimant testified that she was not in the tavern from February 13 to February 20. Transcript at 46. The owner also testified that the manager asked claimant to obtain a doctor's note, and claimant failed to do so. Transcript at 14, 28 to 29. Claimant, however, testified that she obtained a doctor's note on February 18 excusing her from work until February 21, and that she read the note to the manager after claimant's doctor visit on February 18. Transcript at 38. Claimant testified that the manager excused her from work for February 19 and 20, but told her she should return to work on February 23, "or else." Transcript at 38. A person testifying under oath or affirmation is presumed to be truthful unless it can be demonstrated otherwise. *See* ORS 44.370. Claimant's testimony at hearing was consistent and plausible. Moreover, the ALJ did not find claimant lacked credibility at hearing. Absent a reason to disbelieve claimant's sworn testimony at hearing, claimant's first-hand testimony outweighs the employer's hearsay evidence to the contrary. Moreover, claimant's behavior while she was absent from work was consistent with that of a person who was willing to work, but was unable to work due to illness. She called the manager to report she was sick before each shift, and explained the progress of her treatment to the manager throughout her absence. Exhibit 2. The employer therefore failed to meet its burden to show by a preponderance of the evidence that claimant's absence from work was due to a reason other than illness. Absences due to illness are not misconduct. OAR 471-030-0038(3)(b).

The employer discharged claimant, but not for misconduct. Claimant is not disqualified from receiving unemployment insurance because of this work separation.

DECISION: Hearing Decision 14-UI-16847 is affirmed.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: July 3, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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